IN THE

Supreme Court of the United States

JUN 2 1967

JOHN F. DAVIS, CLE

October Term, 1966
No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S PETITION FOR REHEARING.

THOMAS C. LYNCH,
Attorney General of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

GEORGE J. ROTH,
Deputy Attorney General of the State of California,

600 State Building,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

I.

The Court's Ruling Herein Is Based Upon a False Premise Arising Because of Factual Errors 2

II.

The Court's Opinion has Declared Unconstitutional a State Process Which Gives Greater Protection to the Indigent Appellant Than the Procedure Followed in the Federal Courts 6

III.

Rehearing Should Be Granted to Allow Presentation of Argument on Retroactivity in "No-Merit Letter" Cases Where the Appeals Were Final Prior to the Date of Decision in the Instant Matter 7

Conclusion 8

TABLE OF AUTHORITIES CITED

Cases	Page
Douglas v. California, 372 U.S. 353	4
Griffin v. California, 380 U.S. 609	7
Harders v. California, 373 F. 2d 839, U.S.C.A. (9th Cir. 1967)	7
Linkletter v. Walker, 381 U.S. 618	7
Mapp v. Ohio, 367 U.S. 643	7
People v. Anders, 167 Cal. App. 2d 65	3
Tehan v. Shott, 382 U.S. 406	7

IN THE

Supreme Court of the United States

October Term, 1966
No. 98

CHARLES ROBERT ANDERS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of California, respondent in the above entitled matter, hereby respectfully petitions this Honorable Court for a rehearing herein on the following grounds:

(1) The opinion of the Court herein, issued May 8, 1967, contains major factual errors which specifically relate to, and upon which this Court has based its conclusions;

(2) The Court should reconsider and hear further argument relating to the equation of state and federal indigent appellate standards;

(3) This Court should consider further argument relating to the retroactivity of the ruling contained herein insofar as it shall pertain to causes where the appeals have become final prior to the rendering of the instant opinion.

I.

The Court's Ruling Herein Is Based Upon a False Premise Arising Because of Factual Errors.

In its opinion, this Court said, at pages 4 to 5:

". . . Here the court appointed counsel had the transcript but refused to proceed with the appeal because he found no merit in it. He filed a no-merit letter with the District Court of Appeal whereupon the court examined the record itself and affirmed the judgment without comment. On habeas corpus some six years later it found the appeal had no merit. It failed, however, to say whether it was frivolous or not, but, after consideration, simply found the petition to be 'without merit.' The Supreme Court, in dismissing this habeas corpus application, gave no reason at all for its decision and so we do not know the basis for its action. We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae* which was condemned in Ellis, *supra*. Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity. . . ." (Opinion pp. 4-5.)

Exception is first respectfully taken to that part of the above quotation wherein this Court found that after counsel's no-merit letter was written, the District Court of Appeal ". . . examined the record itself and affirmed the judgment *without comment*. . . ." (Emphasis added.) (Opinion p. 5.)

As this Court recognized in page 1 of the instant opinion, the District Court of Appeal unanimously affirmed the conviction in a written opinion set forth in 167 Cal. App. 2d 65, 333 P. 2d 854.

This four-page published opinion in its original unprinted form is part of the record herein and is marked Exhibit 11 attached to the Stipulation as to Contents of Record filed in the office of the Clerk of the Supreme Court on October 10, 1966. Additionally, the opinion is referred to in Appellant's Opening Brief at page 3, and in Respondent's Brief at pages 1, 7, 12, 19, 31, and 32.

As study of the detailed opinion originally written by the District Court of Appeal on January 9, 1959 indicates, that court considered all the possible contentions and found each of them to be totally without merit whatever. Accordingly, it is respectfully submitted that this Court's conclusion the District Court of Appeal initially "examined the record itself and affirmed the judgment without comment" is erroneous.

It is true that "[o]n habeas corpus some six years later they found the appeal had no merit." Since the District Court of Appeal had already written its detailed opinion in 1959, it certainly should not have been required to write another full opinion when the matter was again reviewed on collateral attack. It is submitted that the finding of utter lack of merit in 1959, along

with the detailed explanation of the reasons therefor, and the subsequent review and repeated finding of no merit of 1965, was tantamount and semantically equivalent to a finding of frivolity.

If the paragraph originally taken from pages 4 and 5 of this Honorable Court's opinion is paraphrased by inserting this correct fact, an entirely different result would occur; *i.e.*:

> Counsel examined the record and transcript and found no grounds for appeal; he wrote a no-merit letter to the District Court of Appeal which court examined the full record and reached the same conclusion as counsel that the appeal lacked merit, and expressed its views and reasons therefor in a detailed written opinion; on collateral attack six years later it still found no grounds for appeal; this was tantamount to a finding of frivolity.

Exception is also taken to the assumption that California appointed counsel to act as an amicus in the instant case. Under the California system, whether before or after *Douglas v. California*, 372 U.S. 353 (1963), counsel is now and always has been appointed to act in the capacity of an advocate for the indigent appellant.[1] In the instant case, Mr. Murphy clearly

---

[1]For example, the following memorandum to appointed attorneys was issued by the Anders District Court of Appeal in October, 1966:

"MEMORANDUM TO APPOINTED ATTORNEYS

"The court does not approve the practice of attorneys in advising the court that an appeal has 'no merit.' An at-

was an advocate. Who else but an advocate would actually take the time and trouble to visit the indigent in prison, as he did, undoubtedly in the hope that the personal conference with the client might give a clue to the existence of some hidden error which could not be gleaned from a thorough search of the full clerk's and reporter's transcript composing the record in this case.

It is respectfully submitted that the District Court of Appeal, on its first detailed examination of the entire record in 1959, provided the full consideration and resolution of the matter that it would have done if counsel (who actually acted entirely as an advocate) had written a brief as suggested in the opinion of this Honorable Court.

Respondent respectfully submits that the Court should reconsider its opinion and ruling herein in light of the facts shown by the record on file herein.

---

torney is appointed to serve as an advocate for the appellant, subject to the same obligation of loyalty as though privately employed.

"The court is aware that there are cases in which no ground of reversal appears, and it does not expect any attorney to assert any false statement of fact or law. (See Bus. & Prof. Code sec. 6068, subd. (d).) If counsel is unable to find any grounds of reversal he may state the facts of the case and leave the decision to the court.

"Before any appointed attorney concludes that he has no points to argue, he should ask his client what grounds of appeal he wishes raised. Any points which the appellant personally desires to have raised should be set forth in the brief as contentions of the appellant even though counsel is unable to supply any legal argument or authority in support of such contentions."

II.

The Court's Opinion Has Declared Unconstitutional a State Process Which Gives Greater Protection to the Indigent Appellant Than the Procedure Followed in the Federal Courts.

Under the District of Columbia system essentially adopted by this Court as the procedure to be followed when appointed counsel determines an appeal is wholly frivolous, the federal court can dismiss the appeal without any requirement that the court has read the *entire* record.

In California, the full clerk's and reporter's transcript is always before the appellate court and is examined by that court before any disposal is made of the case and a detailed opinion is then written by the court.

On the other hand, it may be, that when this Court refers in the opinion herein, at page 6, to "a full examination of all the proceedings," it is now requiring that federal courts study the full clerk's and reporter's transcript of the entire case (as is done in California) before a determination is made. In such event, of course, the procedure under the California system and federal system would be equated and there would be no objection on our part. However, we urgently and respectfully suggest that this Court grant a rehearing in the instant matter so that clarification may be had in this connection. We fail to see why a different procedure should apply to the state courts and the federal courts in this matter.

III.

Rehearing Should Be Granted to Allow Presentation of Argument on Retroactivity in "No-Merit Letter" Cases Where the Appeals Were Final Prior to the Date of Decision in the Instant Matter.

As the Court is well aware, neither in the brief nor during oral argument was any discussion had relating to retroactivity of the rule of the instant case; however, because of the magnitude of the problem, not only in California, but in numerous other states which apparently followed our practice (see Resp. Br. p. 30), it is earnestly suggested that rehearing should be granted so that argument may be presented to this Court in opposition to retroactivity of the doctrine set forth in the opinion. Serious questions now arise as to the applicability of law in cases such as *Griffin v. California,* 380 U.S. 609 (1965), and *Mapp v. Ohio,* 367 U.S. 643 (1961), for example. In other words, are reopenings to be considered "final" in terms of *Tehan v. Shott,* 382 U.S. 406 (1966), and *Linkletter v. Walker,* 381 U.S. 618 (1965).

In *Harders v. California,* 373 F. 2d 839, U.S.C.A (9th Cir. 1967), the Circuit Court, referring to *Griffin,* took the view where a once final appeal was reopened because counsel was relieved after he reported to the court that the appeal was without merit, that the new interpretation of old constitutional law was not arguable in the new appellate proceedings.

Conclusion.

Wherefore, respondent respectfully and sincerely requests that a rehearing be granted by this Honorable Court in the above entitled matter.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

GEORGE J. ROTH,
Deputy Attorney General,
Attorneys for Respondent.

BLANK

PAGE